

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

UNITED STATES OF AMERICA

VS.

CIVIL ACTION NO. 2:05cv96
CRIMINAL ACTION NO. 2:02cr18-KS-RHW

CHERYL LYNN WELCH

ORDER

This cause is before the Court on Motion to Vacate under 28 U.S.C. 2255 wherein Petitioner alleges that there were base level enhancements and no amount of drugs in the indictment as to Ground One, that the judge did not accept gun enhancement but the Petitioner still received two points for the gun enhancement as to Ground Two, and the Memorandum arguing *Blakely v. Washington*, 124 S.Ct. 2351 (2004) and *United States v. Apprendi*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed 2d (2000) and the Court after thoroughly reviewing the Motion to Vacate finds that the motion should be denied for the hereinafter stated reasons:

FACTUAL BACKGROUND

Petitioner was convicted of Possession With Intent to Distribute Methamphetamine. She was sentenced to a term of one hundred eight months and other sanctions by order dated December 2, 2002. On April 11, 2005, Petitioner filed the Motion to Vacate. Her motion alleges that there has been an intervening rule of Constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable or that it should be made retroactive based on applicable case law and *Blakely and Apprendi*. The law is clear in this circuit. The Supreme Court has made no new rule retroactive and the only way that a new rule can become retroactive is by action of the Supreme Court. Petitioner has failed in her attempt and significant case law has developed since the filing of her motion. Said case law in this

circuit and in others is contrary to her position. In Re *Elwood* 408 F.3d 211. This Court therefore finds that the motion filed herein should be **denied**. A separate judgment will be entered herein in accordance with this order as required by Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED AND ADJUDGED on this, the 10th day of April, 2006.

s/ *Keith Starrett*

UNITED STATES DISTRICT JUDGE